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NO. 83-728

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ORIGINAL BRIEF ON THE MERITS ON BEHALF OF HERB'S WELDING, INC. AND GUARANTY CO., PETITIONERS HEREIN

WOOD BROWN III
MONTGOMERY, BARNETT,
BROWN & READ
1800 FIRST NATIONAL BANK
OF COMMERCE BUILDING
NEW ORLEANS, LOUISIANA 70112
TELEPHONE (504) 561-8989

ATTORNEYS FOR PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

26pp

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QUESTIONS PRESENTED

(1) Whether a welder working on a fixed platform in Louisiana territorial waters is covered under the Longshoremen & Harbor Workers Compensation Act (33 U.S.C. §§901, et seq., particularly §§902(3) and 903.)

(2) Whether workmen engaged in support activities (such as welding) in connection with mineral extractive activities are engaged in "maritime employment" (33 U.S.C. §902[3]).

(3) Whether workmen on fixed platforms in Louisiana territorial waters are working in a covered situs as required by 33 U.S.C. §903.

(4) Whether oil field labor, such as welding, is "maritime employment" as that term is contemplated in the Longshoremen & Harbor Workers Compensation Act, 33 U.S.C. §902[3].

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed below:

Robert H. Gray
Herb's Welding, Inc.
United States Fidelity & Guaranty Co.
Director, Office of Workmens Compensation Programs, United States Department of Labor.

Pursuant to Rule 28.1 of the Rules of this Court, undersigned counsel certifies to the Court that, after diligent investigation, he is advised that the United States Fidelity & Guaranty Co. has no parent companies, affiliates or subsidiaries as those terms are used in said rule. Undersigned counsel further certifies that Herb's Welding, Inc. is no longer in existence, however, based on personal knowledge, it had no parent companies, affiliates or subsidiaries when it was in operation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
CONCLUSION—PRECISE RELIEF SOUGHT	18
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

Cases: **Page**

Barnes v. Sun Oil Co.,
362 So.2d 761 (La. 1978) 13

Bible v. Chevron Oil Co.,
460 F.2d 1218 (5th Cir. 1972) 13

Boudreaux v. American Workover, Inc.,
664 F.2d 463 (5th Cir. 1981); Rehearing Granted 664 F.2d 480 (5th Cir. 1982); (5th Cir. 1982) 6, 7, 10, 11

Broussard v. Heebe's Bakery, Inc.,
263 La. 561, 268 So.2d 656 (1968) 13

Chevron Oil Co. v. Huson,
404 U.S. 97, 92 S.Ct. 349 (1971) 5, 7, 8, 9, 10, 11

Director, Office of Workmens Compensation Programs v. Perini North River Associates,
__ U.S. __, 103 S.Ct. 634 (1983) 10, 14

Dore v. Link Belt, Inc.,
391 F.2d 671 (5th Cir. 1968) 8

Gray v. Chevron Oil Co.,
631 F.2d 1263 (5th Cir. 1980); 644 F.2d 540 (5th Cir. 1981) 13

Herb's Welding, Inc. v. Gray,
703 F.2d 176 (5th Cir. 1983); Application and Suggestion for Rehearing denied, 711 F.2d 666 (5th Cir. 1983) 1, 2

Moragne v. States Marine Lines,
398 U.S. 375, 90 S.Ct. 1772 (1970) 9

North East Marine Terminals, Inc. v. Caputo,
432 U.S. 249, 97 S.Ct. 2348 (1977) 4

P. C. Pfeiffer Co., Inc. v. Ford,
444 U.S. 69, 100 S.Ct. 328 (1980) 15

Pippin v. Shell Oil Co.,
661 F.2d 378 (5th Cir. 1981) 6, 10, 11

Rodrigue v. Aetna Cas. & Sur. Co.,
395 U.S. 352, 89 S.Ct. 1835 (1969) 5, 6, 7, 8, 9, 10, 11, 12, 13, 16

Rodrigue v. Aetna Cas. & Sur. Co.,
395 F.2d 216 (5th Cir. 1968) 8

Sea-Land Services, Inc. v. Gaudet,
414 U.S. 573, 94 S.Ct. 806 (1974) 9

Sun Ship, Inc. v. Pennsylvania,
447 U.S. 715, 100 S.Ct. 2432 (1981) 13

Thornton v. Brown & Root, Inc.,
707 F.2d 149 (5th Cir. 1983) 7, 11

Victory Carriers v. Law,
404 U.S. 202, 92 S.Ct. 418 (1971) 6, 17

STATUTES

28 U.S.C. §1254(1) 2
33 U.S.C. §902(3) . . . . . i, 2, 3
33 U.S.C. §903 . . . . . i, 3, 12
33 U.S.C. §919, 921(b), 921(c) 16
43 U.S.C. §1333 . . . . . 4, 14
La. R.S. 23:1032 13

OTHER AUTHORITIES

U.S. Code Congressional & Administrative News, 1972 p. 4708 15
Senate Report 92-1125 p. 13 (1972) 15
House Report 92-1441 p. 10-11 (1972) 15
Hearings before the U.S. Senate Committee on Labor & Public welfare on S2318, 525 and 1547 . . 14

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MAY IT PLEASE THE COURT:

This is the original brief on the merits on behalf of Herb's Welding, Inc. and United States Fidelity & Guaranty Co., petitioners herein.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 703 F.2d 176 (5th Cir. 1983). It has been reproduced in the Appendix to the petition for this writ (A-1, *et. seq.*). An

application for rehearing and a suggestion for a rehearing en banc were denied on August 8, 1983 and there is a separate opinion concerning this reported at 711 F.2d 666 (5th Cir. 1983). This opinion is reproduced at Appendix B attached to the writ application.

There were other opinions below, in the administrative and judicial ladder leading to this Court. The original opinion of the Administrative Law Judge is reproduced as Appendix C to the application. The matter was appealed therefrom to the Benefits Review Board and the opinion of that tribunal is attached to the writ application as Appendix D. The matter was further appealed to the United States Court of Appeals for the Fifth Circuit where the appeal was dismissed as premature. The decision is unreported as far as this writer can tell but the decision and order is appended to the writ application as Appendix E. The Administrative Law Judge issued and Opinion and Order on Remand which is attached to the application as Appendix F. The Benefits Review Board "Decision and Order" on appeal from that decision is attached as Appendix G to the writ application.

JURISDICTION

The jurisdiction of this Court is premised on 28 U.S.C. §1254(1), this being a case arising from one of the Courts of Appeals. The application for rehearing in the Court of Appeals and the suggestion for rehearing en banc was denied by that Court on August 8, 1983. The petition for a writ of certiorari was filed in this Court on October 14, 1983.

STATUTE INVOLVED

Sections 2(3) and 2(4) of the Longshoremen & Harbor

Workers Compensation Act (33 U.S.C. §§902(3) and 902(4)) provides in pertinent part:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker ...
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a) of the Longshoremen & Harbor Workers Compensation Act (33 U.S.C. §903(a)) provides in pertinent part:

> Sec. 3.(a) Composition [sic] shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel ...

STATEMENT OF THE CASE

The facts applicable to this case are stated by the organ of the Court of Appeals (703 F.2d at 177) (A-2, Appendix to Petition for Writ of Certiorari):

"Gray, a welder with Herb's Welding, was assigned to the Bay Marchand oil and gas field which is located both in Louisiana territorial waters and over the Outer Continental Shelf. There Gray helped repair and maintain oil and gas lines and fixed platform production structures.

When he was on duty, Gray lived, ate and slept on a structure situated in Louisiana waters, and he worked on platforms located in both Louisiana and Outer Continental Shelf waters. He was transported to his daily work sites by boat or helicopter. On July 11, 1975, Gray was welding a two-inch gas line on a platform in the navigable waters of Louisiana when an explosion occurred. Gray, in trying to run from the area, twisted his knee.

The insurance company paid Gray temporary total disability, permanent partial disability and related medical expenses under Louisiana worker's compensation. .."

SUMMARY OF ARGUMENT

For an injury to a workman to be covered by the LHWCA, two conditions must be present: first, the accident must occur on a "covered situs" and the worker must have "status".[1] In the case at bar, the appellate court held that a platform inside the three mile limit[2] was a covered

[1] See the analysis in *Northeast Marine Terminals, Inc. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348 (1977)

[2] Thus, by its very terms, the Outer Continental Shelf Lands Act (43 U.S.C. §1331, et seq.) does not apply to the juridical transaction which forms the basis of this litigation. The platform, by definition lies within Louisiana's territorial waters, not on the Outer Continental Shelf.

situs and held that oil field labor or mineral extractive operations was "maritime employment" and therefore the workers performing work in the production of minerals on such platforms were covered by the LHWCA.

The decision below that oil field labor is somehow "maritime" in character when performed on platforms is contrary to prior decisions by this Court in *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969) and *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971). Additionally, it is contrary to the apparent intent of Congress. As a result, this decision cannot be permitted to stand and must be reversed by this Court.

Likewise, the decision below that fixed platforms are covered "siti" is something which is not inferred from anything in the statute and is not something that follows from any prior decisions of this Court. If this is the law, then this Court should decide it.

ARGUMENT

The considerations involved with the questions of "situs" and "status" are not sufficiently distinct for each to be bundled up into a neat ball for presentation in a brief like this. There are points which bear on each question and there is, of necessity, some overlap.

The consideration of the case starts with an analysis of the rationale of the opinion of the Court below. The court there properly states the threshhold issue: whether the LHWCA can reach an oil field worker injured on a fixed platform located in Louisiana territorial waters. Reference was immediately made to this Court's decision in *Rodrigue, supra*. It is stated that this Court "likened" these offshore

platforms to wharves located over navigable waters. It is then stated that wharves and piers were not covered by the LHWCA prior to 1972 (and therefore were not covered at the time of the decision in *Rodrigue*).[3] However, the reasoning goes, since the LHWCA amendments in 1972 extended coverage to wharves and piers, this in effect overruled that portion of *Rodrigue* and constituted oil field platforms as covered siti.[4]

In making this determination the Court of Appeals stated that these platforms "are essential to and customarily used in the loading and unloading of crews, supplies and oil." The Court used this factor to buttress the conclusion that the fixed platform is a covered situs.

The opinion then proceeds to discuss status and, premised on the same Court's previous decisions in *Pippin v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981) and *Boudreaux v. American Workover, Inc.*, 664 F.2d 463 (5th Cir. 1981), 680 F.2d 1034 (5th Cir. 1982), Cert. denied, __ U.S. __ 103 S.Ct. 815 (1983). The Court held that, as a matter of law, oil field labor is "maritime employment" as that term is defined in the LHWCA.[5] On the basis of this, the determination is

[3] See *Victory Carriers v. Law*, 404 U.S. 202, 92 S.Ct. 418 (1971).

[4] Here, again, the dichotomy between platforms on the Outer Continental Shelf and those in state waters should be kept in mind. Accidents and injuries which occur more than three miles offshore are covered by the LHWCA because of the operation of the Outer Continental Shelf Lands Act (OCSLA). *Rodrigue* did not deal with this point because (1) it was not before the Court, it could not be, and because (2) OCSLA mandated coverage by the LHWCA. The point here is that *Rodrigue* is irrelevant in a determination of "situs". The situs there was present as a matter of law. It was present because Congress mandated that it be so. There is no such mandate as to inshore platforms.

[5] The same Court has more recently taken this "principle of law" as being established in "this circuit", citing its own decisions in *Pippin*,

made that Gray was covered satisfying both the situs and status tests mandated by this Court's earlier decisions.

Thus, what we have is the use of this Court's landmark decision in *Rodrigue* to justify a finding of "situs", something that was not at issue there and something that decision does not stand for at all. And, in the very next section of the opinion, the Court turns its back on *Rodrigue* and decides that oil field work is maritime in nature, something totally inconsistent with the letter and spirit of the *Rodrigue* decision.

Status—The Inconsistency with Rodrigue and Huson

As mentioned above, a finding of coverage under the LHWCA requires a dual determination that there is a covered "situs" and a covered "status". In its determination of "status" the Court below makes a determination that oil field labor is "maritime employment". This determination is directly contrary to this Courts decision in the *Rodrigue* decision.

The issue in *Rodrigue* was whether plaintiffs in wrongful death actions could avail themselves of Louisiana law as regards recovery, or whether they were limited to the less generous provisions of the Death on the High Seas Act. This Court, reversing the Fifth Circuit held that offshore platforms were islands, that they were treated like federal enclaves in state territory, that federal law applied except where there was an hiatus therein, in which cases Louisiana law applied. On the face of it, it does not seem

(Footnote 5 continued)
Boudreaux, and in the instant case. See *Thornton v. Brown & Root, Inc.*, 707 So.2d 149 (5th Cir. 1983).

that that decision has anything to do with the dispute before the Court in the captioned case.

However, a review of the case, especially in the light of the appellate decisions[6] and in the light of a subsequent decision explaining and limiting the result,[7] it is apparent that, *prior* to this Court's decision in *Rodrigue*, oil field workers were held to be maritime workers, essentially because the work they performed was performed in a location surrounded by water and because the work they did was essential to the commerce of the area, which, being on the water, was "maritime". Indeed, this is the rationale of the two appellate decisions which were reviewed and reversed in the decision by this Court in *Rodrigue*.

Those cases, applying then settled jurisprudence, make the admiralty law applicable and take the expected next step to oust state law because of the uniformity of the admiralty principle. This Court's opinion in *Rodrigue* is a complete treatise on why admiralty law does not apply. The legislative history is traced, leading to the conclusion that Congress did not intend that admiralty law apply to persons working on platforms on the outer continental shelf. This history is only tangentially important here because this platform on the facts, was not on the outer continental shelf. What is important in the *Rodrigue* decision is the rationale which supports the conclusion that these workmen are, essentially, landbased workers doing land based type work.

[6] *Dore v. Link Belt, Inc.*, 391 F.2d 671 (5th Cir. 1968); *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 F.2d 216 (5th Cir. 1968).

[7] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971).

The *Huson* decision, which came down two years later makes it abundantly clear what the Court was doing in *Rodrigue*, that is, abandoning admiralty law in favor of state law as to disputes arising on fixed platforms. This decision involved the application of Louisiana prescription (statute of limitations) which would have barred plaintiff's claim. The precise holding is that the plaintiff in that case would not be barred because of his reliance on the "pre-Rodrigue application of admiralty law". However, the result makes it clear that prior to *Rodrigue*, admiralty law applied to these cases.

The point here is that *Rodrigue* and *Huson* stand for the proposition that offshore oil field workmen are not "maritime workers". If it were any other way, perhaps it could be said that there would be a resort to Louisiana wrongful death relief (barring application of the uniformity principle) but there is no way it would be said that Louisiana prescription applies. If these men were maritime workers, then the maritime doctrine of laches would necessarily apply. Put another way, if the Court of Appeals in this case is right, then Mr. Huson did not need to come here, prescription was no problem to him and Mrs. Dore and Mrs. Rodrigue would have gotten only pecuniary losses rather than the more generous recovery permitted under Louisiana law. But that didn't happen, and the reason it didn't was, in part, due to the fact that Mess'rs Dore, Rodrigue and Huson were *not* maritime workers.[8]

[8] At the time the *Rodrigue* decision came down, there was no wrongful death remedy in the federal maritime law. Subsequent to that decision, this Court overruled that line of cases and held that such a cause of action did exist under the maritime law. See *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772 (1970); *Sea Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806 (1974). Thus, at the present time, insofar as the issue which was before the Court in *Rodrigue* is concerned, there is no difference between the result obtained in Louisiana or under the general maritime law.

Admittedly, *Rodrigue* and *Huson* involve cases which arose on platforms on the outer continental shelf. However, there is no demonstrable or demonstrated difference between the work described in those opinions or of work on the outer continental shelf in general and the work described in the case at bar. Indeed, the statement of facts in this case is that Gray worked sometimes on the outer continental shelf and sometimes on the state water platforms. Any distinction that *Rodrigue* and *Huson* are somehow different because they arose offshore and Gray arose inshore would be a distinction without a difference.

The genesis of the notion that oil field labor is somehow "maritime" in nature comes originally from the Fifth Circuit's opinion in *Pippin v. Shell Oil Co., supra.* It was carried forward by the same Court in *Boudreaux v. American Workover, Inc., supra.* A writ application was forwarded to this Court in *Pippin*, but was late filed and was therefore rejected by the Clerk. The writ application in *Boudreaux* was filed and was later denied by the Court on the basis of the then recent decision of this Court in *Director v. Perini North River Associates*, __ U.S. __, 103 S.Ct. 634 (1983).[9]

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[9] The decision in *Director v. Perini* was on the basis of a finding that Mr. Churchill, the claimant there, would have been covered by the LHWCA prior to the passage of the 1972 amendments, and, since there was no evident intention on the part of Congress to restrict coverage, Churchill would necessarily be covered thereafter. On this basis, the decision of the Second Circuit denying benefits was reversed.

This result controlled the *Boudreaux* decision since Mr. Boudreaux had been hurt on a barge and he would have been covered by the LHWCA before 1972. No reasons were assigned for the denial of the writ but it is assumed that this was the reason for the denial. The question ancillary to that in *Boudreaux*, which adopted the reasoning in *Pippin* concerning the "maritimeness" of oil field work was not addressed by this Court.

There is nothing in *Pippin*, or *Boudreaux*, or this case, or the more recent decision of the Fifth Circuit in *Thornton v. Brown & Root,*[10] which justifies factually the conclusion that production of minerals from the seabed is "maritime commerce" or that the work being performed by those so engaged is maritime employment. If some factual showing had been made below and if this factual showing were stated into the opinions as justifying a change in this Court's conclusion in *Rodrigue*, then, perhaps there would be some justification for the differing result. However, as mentioned, there is no such factual justification either made or stated. Without such justification, we suggest that this Court's decisions in *Rodrigue* and *Huson* control. There is nothing maritime about the work which Robert Gray was doing at the time of his injury.

There is no automatic status finding because someone was involved in the production of minerals from the seabed of Louisiana waters. The holding to the contrary by the appellate court below is contrary to the prior decisions of this Court and should not be permitted to stand.

(Footnote 9 continued)

The result in *Director v. Perini* does not control this decision because the accident to Mr. Gray did not occur on a vessel, but on a platform. There is no "instant situs" in this case.

[10] 707 F.2d149 (5th Cir. 1983). *Thornton* holds that workers on land constructing offshore platforms are covered by the LHWCA their work is on the platforms which are used in the "maritime commerce" of producing oil from the seabed. This is the "next step" from the unsupported conclusion of *Pippin*, perpetuated in *Boudreaux* and in the opinion which is the subject of this application.

To the extent that this conclusion is one of law, we suggest that it, as well, is a matter which has not been passed on by this Court and that it is something that this Court should pass on, and we will treat of this in the next section as well.

2. Situs—A New Creation of Federal Jurisprudence

The federal point here is whether fixed platforms in state territorial waters are "siti" or locations as contemplated by the LHWCA such that maritime workers injured thereon are covered by the act. This Court has not passed on that point.

To start with, as conceded in the appellate opinion below, *Rodrigue* requires that this platform be treated as an island (703 F.2d at 179). There is nothing in the facts which would bring this platform or the location where the accident happened within the statutory definition of a covered situs. The statute says that accidents and injuries are covered where they occur "upon the navigable waters of the United States including any adjoining pier, wharf, dry-dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel."[11] The facts of this case do not on their face bring the area where the accident occurred within that definition, especially in view of the *Rodrigue* opinion which makes this an island.

The reasoning of the Court of Appeals is that, since this Court "likened" platforms to wharves in the *Rodrigue* decision and since Wharves were not covered in 1969 but are not, as a result of the 1972 amendments to the LHWCA, therefore platforms are wharves and constitute covered "siti" at this time.

Two analyses have to be made of this reasoning. First, can it be said in the passage of the LHWCA extension in 1972 that Congress intended to extend coverage to

[11] 33 U.S.C. §903(a).

all oil field workers on inshore platforms? Secondly, is the analogy to the language of the *Rodrigue* decision appropriate in this case?

(a) *Congress' Intention*

It is, of course, undeniable that there is nothing in the 1972 extention of the LHWCA concerning oil field workers. More to the point, there appears to be nothing that evidences an intention to extend coverage of the act to workmen on platforms in state waters who were never covered before. See *Bible v. Chevron Oil Co.*, 460 F.2d 1218 (5th Cir. 1972); *Gray v. Chevron Oil Co.*, 631 F.2d 1263 (5th Cir. 1980), 644 F.2d 540 (5th Cir. 1981).[12]

[12] *Gray v. Chevron*, referred to above, involves the same Robert H. Gray who is respondent here, and reaches a directly contrary to the result here, at least on its face. Gray filed a suit in tort against Chevron for his injuries. Chevron interposed a "statutory employer" defense permitted in Louisiana. Louisiana extends the tort immunity of the employer to the general contractor or "principal" as well. See *Broussard v. Heebe's Bakery, Inc.*, 263 La. 561, 268 So.2d 656 (1968); *Barnes v. Sun Oil Co.*, 362 So.2d 761 (La. 1978). This principle was subsequently codified into positive law, La. Act 147 of 1976, La. R.S. 23:1032.

The point of this is that Chevron successfully interposed the Louisiana defensive doctrine and this was affirmed by the Fifth Circuit on the basis that this was a Louisiana state case, having occurred on an inshore platform, and that the LHWCA did not apply. In this case which is the subject of this appeal, the Court reversed itself, without mentioning its prior decision, holding that the LHWCA did apply. The anomaly is treated by the Court in its per curiam in the denial of the application for rehearing and the suggestion of rehearing en banc.

While the rationales of the two decisions are clearly inconsistent, the results are not necessarily so. It is legally possible for two compensation schemes to operate in the same geographical area, *Sun Ship Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432 (1981). There is nothing abhorrent in permitting a claim under one act and applying the defensive provisions of both acts to compensation claimant's suit in tort. Louisiana has a "statutory employer" defense and the LHWCA prohibits suits against co-employees.

It is true that another bill was considered in the U.S. Senate at approximately the same as the 1972 extension of the LHWCA which would have extended the LHWCA to all oil field workers, whether or not they were "seaman".[13] This writer does not find anything in the materials concerning that bill which would have indicated an intent to extend LHWCA coverage to platform workers in state waters (or, to the contrary to exclude them from coverage). However, the bill was broad enough arguably to extend coverage to everyone engaged in "maritime extractive operations." The important point in mentioning this bill is that the bill did not pass!!

It is possible to infer, from some of the discussion reported[14] that Congress intended to maintain coverage for those workers covered at the time of the discussion in the then pending extension of the LHWCA. (Which is the sense of the *Perini* case, *supra*.) However, the fact of the non-passage of this bill, given its subject matter (coverage of all workers engaged in "maritime extractive operations") coupled with the failure to include oil field workers *at all* in the extension of the LHWCA[15] leads inexorably to

[13] This was the so-called "Tower Bill" Senate Bill 1547, 92nd Congress. The hearings on this bill and the LHWCA extension were held at the same time. Hearings Before the Senate Subcommittee on Labor, Senate Committee on Labor & Public Welfare on S2318, S525 and S.1547, 92nd Congress. Second Session.

[14] *Id.* at 256, 487, 574, 577.

[15] In considering this, the Court should not be misled by the fact that oil field workers on the outer continental shelf are covered by the LHWCA because of the specific terms of the Outer Continental Shelf Lands Act, 43 U.S.C. §1333 (as it existed at the time this accident occurred in 1975). This is so, obviously, because Congress mandated that it be so, something that cannot be said of workers on Louisiana state water platforms. In cases arising on the outer continental shelf, there is coverage under the LHWCA because it is mandated by the terms of

the conclusion that workers in the same category as Mr. Gray were not intended to be included in the extension.

First, they are not mentioned, expressly or by implication. Second, a bill which likely would have included them was not passed by the Congress. The combination of these factors indicates that Congress did not intend that the extension act of 1972 to include these workers.

Finally, on this point, a welder on a production platform in state territorial waters is no more engaged in "maritime employment" than would be the employee hired to handle stored cargo in connection with transshipment or the clerical employees mentioned by Congress (S. Rep. 92-1125, p. 13 (1972); H. Rep. 92-1441, p. 10-11; U.S. Code Cong. & Adm. News, 1972, p. 4708, et seq.), and mentioned by this Court in *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 at 79-80, 100 S.Ct. 328 at 335-36 (1979). Moreover, if this platform in inshore waters is to be treated as a covered "situs", it must be so treated as an *onshore* situs under *Pfeiffer, supra*. The point here is that there is nothing in Congress' action in the 1972 extension act which evidences an intention to cover Gray, either as a welder or as a maritime extractive worker on a fixed platform on Louisiana territorial waters.

(b) *Analogy to Rodrigue*

This leads to the second point. Boiled down to its

(Footnote 15 continued)
OCSLA. In other words, Congress has supplied situs and status by legislative mandate. Situs is supplied by the statement that every accident is covered by the LHWCA. Status is likewise supplied by the same statement since everything having to do with the production of minerals is supplied.

essentials, the reasoning of the Court of Appeals on the "situs" question is that (1) this Court in *Rodrigue* "likened" platforms to wharves, (2) wharves were not covered in 1969 when Rodrigue was decided; however, (3) wharves are covered now by virtue of the 1972 extension of the LHWCA, (4) therefore, platforms inshore are covered now.

We respectfully submit that the opinion of this Court at no time "likened" platforms to wharves. The word is used *once* in the *Rodrigue* opinion, then in the context of a discussion of the history of the OCSLA (395 U.S. at 366, 89 S.Ct. at 1842). Even the "likening" defeats the analogy because the remark in which wharves are referred to is a notation that accidents thereon were not covered because Congress, at that time, had not mandated that there be coverage. The point is that the opinion of this Court does not equate wharves and piers on the one hand with offshore platforms on the other. The sense on the opinion is more one of differentiation than of equating the structures and their purposes.[16]

[16] This "likening" or equating by the Court of Appeals is also unsupported in the record before the Court. There is nothing which indicates that the area of the platform where Gray was injured was used for loading and unloading (704 F.2d at 178) or that the entire platform was so used (704 F.2d at 179). Of course, if this were true, then the area is a maritime "situs" because of this fact alone. That it is not so in this case is seen by the mental gymnastics indulged by the Court of Appeals in resorting to the misinterpretation of the *Rodrigue* decision to justify its conclusion. Put another way, if there was maritime "situs" as a result of the nature of the activity thereon, why go to the trouble to justify it otherwise on such shaky grounds?

More to the point, a careful reading of the underlying decisions of the Administrative Law Judge and of the Benefits Review Board indicate absolutely no basis for such a conclusion. Under the appellate scheme set up in the LHWCA (33 U.S.C. §921[c]) findings of fact must be made on the trial level. If such a finding were necessary, then, perhaps the matter should have been remanded once more because it simply does not exist otherwise in the record before that Court or the record here.

We further respectfully submit that the reasoning that this Court used in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 92 S.Ct. 418 (1971) is applicable here. There, the suggestion was made that there should be coverage to workmen on wharves because they were doing essentially the same work that their co-workers were doing in the holds of the ships only a short distance away. This Court rejected the argument and closed with the following:

> "...Congress might well prefer not to extend the jurisdiction of the federal courts. On the other hand, if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and II of the Constitution to enact a suitable solution."

This is no less true in this case. It is apparent from that above that Congress has not seen fit to extend coverage to workers on fixed platforms in state waters. It is also apparent that Congress had before it a bill which would have had the effect of extending such coverage and that that bill was not passed. The effect of the decision of the Court of Appeals is to accomplish withe the stroke of a judicial pen that which Congress declined to do.

In conclusion, we respectfully suggest that the decision of the Court of Appeals that oil field labor is "maritime in nature" is (1) not supported in the record of this case or of the cases to which reference is made; (2) is directly contrary to and in the face of the major prior decisions of this Court on point, and (3) Constitutes a decision of an important point of federal law which should be decided by this Court. Specifically, Congress declined to grant coverage under the LHWCA to claimants like Mr. Gray by failing to adopt the Tower Bill mentioned above. If coverage is to be

extended judicially, it should be this Court which extends it, not the Court of Appeals.

Likewise, the holding that platforms in state waters are covered "siti" is something that Congress failed to enact, given the specific opportunity to do so. If the failure of Congress to pass this bill is to be corrected by the Courts, it should be this Court which makes the correction, not the Court of Appeals.

However, following the logic that this Court has followed previously, we suggest that the extension of coverage to plaintiffs like Mr. Gray is something which should be left to Congress. When the Court of Appeals usurped Congress' function in making such an extension, it erred and this error should be reversed by this Court.

CONCLUSION
PRECISE RELIEF SOUGHT

The precise relief sought by petitioners is the reversal of the decision of the Court of Appeal and the Benefit Review Board. The claim for compensation presented on behalf of Robert H. Gray should be dismissed or this Court should order the dismissal below on the ground that there is no coverage under the LHWCA and therefore no right in the said claimant to recover herein.

GOLD, LITTLE, SIMON, WEEMS & BRUSER
JOHN F. SIMON, ESQ.
P.O. Box 6118
Alexandria, La. 71301

MONTGOMERY, BARNETT, BROWN & READ

Wood Brown III
1800 First Nat'l Bank of Commerce Bldg.
New Orleans, La. 70112

CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, certifies that three copies of this petition and all related documentation has been mailed to each opposing counsel as follows:

Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Joshua S. Gillelan, II, Esq.
Office of the Solicitor of Labor
U.S. Department of Labor
Suite N2620 - NDOL
Washington, D.C. 20210

James J. Brady, Esq.
P.O. Box 1792
Alexandria, La. 71301

T. Gerald Henderson, Esq.
P.O. Box 407
Alexandria, La. 71301

Undersigned counsel makes this certificate for purposes of complying with Rule 28.3 and 28.5 of the Rules of this Court.

Wood Brown III